Supreme Court, U.S.
FILED
OCT 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-801

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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No.

LOUIE L. WAINWRIGHT,
Secretary, Florida
Department of
Corrections,

Petitioner,

-v-

KENNETH GRIFFIN,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

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Attorney General

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## Question Presented

WHETHER THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE HOLDING THAT RESPONDENT WAS ENTITLED TO A HEARING ON HIS CONTENTION THAT THE DEATH PENALTY IN FLORIDA IS DISCRIMINATORILY IMPOSED BASED ON THE RACE OF THE VICTIM CONFLICTS WITH THE DECISIONS OF THIS COURT IN Sullivan v. Wainwright, U.S. ____, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); Wainwright v. Ford, ____ U.S. ____, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984); and Wainwright v. Adams, U.S. ____, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984).

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PETITION FOR A WRIT OF CERTIORARI
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---

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOWS

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Griffin v. Wainwright, 760 F.2d 1505 (1985). The opinion granted respondent a hearing on the issue of whether the death penalty in Florida is discriminatorily imposed based on the race of the victim. This opinion appears in the appendix as 1a-72a.

The opinion and order of the district court denying application for a stay of execution and petition for writ of habeas corpus is reported as Griffin v. Wainwright, 588 F.Supp. 1549 (M.D. Fla. 1984).

The opinion of the Florida Supreme Court affirming respondent's conviction and sentence of death is reported as Griffin v.

State, 414 So.2d 1025 (Fla. 1982). The opinion of the Florida Supreme Court denying respondent's petition for writ of habeas corpus and application for stay of execution is reported as Griffin v. State, 447 So.2d 875 (Fla. 1984).

## JURISDICTIONAL STATEMENT

The opinion of the Eleventh Circuit Court of Appeals (hereinafter called the Eleventh Circuit or lower court) was filed on May 10, 1985 and rehearing and rehearing en banc denied on August 5, 1985.

By order dated August 5, 1985, the lower court stayed the issuance of its mandate to and including November 1, 1985. This Court has jurisdiction to hear this cause pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2101(c) provides:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

## STATEMENT OF THE CASE

### A. History of the Case

On October 30, 1978, respondent was charged by indictment with two counts of murder in the first degree for the deaths of Glen Cavell Lundgren and Keith Kirchaine in Bradford County, Florida. On March 15, 1979, respondent was convicted of first-degree murder on both counts and on the following day the jury recommended a sentence of death. Agreeing with the jury's recommendation, the trial judge imposed the death sentence on April 19, 1979. The Supreme Court of Florida affirmed respondent's conviction and sentence of death. Griffin v. State, 414 So.2d 1025 (Fla. 1982).

Pursuant to Fla. R. Crim. P. 3.850, respondent filed a motion to vacate, set

aside or correct conviction and sentence on April 20, 1983. Counsel for respondent filed an amended motion to vacate on March 6, 1984, and further supplemented that motion on March 9, 1984. The trial court held a hearing on the amended motion on March 9, 1984. Following oral argument, the trial court granted an evidentiary hearing on respondent's claim of ineffective assistance of counsel, and denied the remainder of his claims as barred by procedural default.

On March 14, 1984, respondent filed with the Supreme Court of Florida a petition for writ of habeas corpus, an application for stay of execution, and an appeal from the trial court's Order Denying the Amended Motion. On March 16, 1984, the Supreme Court of Florida affirmed the trial

court's order and denied both the petition for writ of habeas corpus and respondent's application for stay of execution. Griffin v. State, 447 So.2d 875 (Fla. 1984).

On March 16, 1984, respondent filed an application for stay of execution and petition for writ of habeas corpus in the federal district court in Jacksonville, Florida. After hearing argument by counsel for the respective parties, the district court by order March 21, 1984, denied the petition for writ of habeas corpus; denied application for stay of execution except to the extent necessary to allow respondent an opportunity to perfect an appeal to the Eleventh Circuit; and granted a certificate of probable cause. Griffin v. Wainwright, 588 F.Supp. 1549 (M.D. Fla. 1984).

In an opinion dated May 10, 1985, the Eleventh Circuit remanded with directions to the district court to hold a hearing on respondent's contention that the death penalty in Florida is discriminatorily imposed based on the race of the victim. Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985).

B. Statement of the Facts

This case arose out of a convenience store robber/murder. In September 1975, Willie James Bryant offered respondent, whom he knew, and Robert Hinson a ride. At respondent's direction, Bryant drove to a store and parked while respondent and Hinson went inside. Shortly thereafter, Bryant heard a gunshot and saw respondent run out of the store with Hinson and a young man whom respondent had under his arm. Both respondent and Hinson had pistols in their hands and Hinson was carrying some bags. All three climbed into the back seat of the car and the young man asked respondent why he had to shoot the man. Respondent replied that the man tried to go for a gun or something. Bryant testified at trial that they traveled down

the road for a few miles and then stopped. Respondent took the young man into the woods and shot him. Bryant could see the young man when he was shot and saw respondent shoot him again after the fell to the ground. Bryant also testified that respondent had slapped the young man in the car to stop him from begging for his life. Bryant then drove respondent and Hinson to Gainesville and was given twenty-five dollars from the robbery proceeds. Bryant voluntarily went to the police and told them what had happened.

Alex Henry testified that he knew respondent on September 11, 1975. On that morning, after Henry had heard of the robbery and murder on the radio, respondent came up to him with a brown bag in his hand. At that time, respondent told Henry

that he had committed the job Henry had heard on the radio and showed Henry a pistol in the bag which respondent said was a .22 caliber. Respondent also told Henry that he had shot the boy in the woods as well as doing the shooting in the store.

Thomas Gnagi, store manager, testified that he kept a loaded Western-style .22 caliber revolver on the premises for protection and his wife testified that between $250 and $300 had been taken from the store. The emergency-room physician testified that Lundgren died of a single bullet wound to the back of his head.

Roger A. Ashbury, special agent of the FBI, testified that the bullets and bullet fragment taken from both victims contained no dissimilarities and were consistent with known data as having been fired from a

Hawes manufactured Western-style .22 caliber pistol.

## BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

## REASONS FOR GRANTING THE WRIT

THE DECISION OF THE ELEVENTH CIRCUIT REMANDING FOR EVIDENTIARY HEARING ON THE ISSUE OF DISCRIMINATORY APPLICATION OF DEATH PENALTY ON THE BASIS OF RACE CONFLICTS WITH THE DECISIONS OF THIS COURT IN SULLIVAN V. WAINWRIGHT, 464 U.S. 109, 104 S.CT. 450, 78 L.ED.2D 210 (1983); WAINWRIGHT V. FORD, _____ U.S. _____, 104 S.Ct. 3498, 82 L.ED.2D 911 (1984); WAINWRIGHT V. ADAMS, _____ U.S._____, 104 S.Ct. 2183, 80 L.ED.2D 809 (1984); AND SULLIVAN V. WAINWRIGHT, 464 U.S. 109, 104 S.CT. 450, 78 L.ED.2D 210 (1983).

The claim of discrimination in capital sentencing based upon the race of the victim first surfaced in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The Fifth Circuit flatly rejected the claim under the Eighth Amendment, stating:

> . . . if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness-- and therefore

> the racial discrimination--condemned in Furman [v. Georgia, 408 U.S. 238 (1972)] have been conclusively removed. Florida has such a statute and it is being followed. The Petitioner's contention under the Eighth and Fourteenth Amendments is therefore without merit.

Spinkellink v. Wainwright, supra, at 613, 614. And as to any claim of denial of Equal Protection of the law, the court he that a showing of racially disproportiona impact was not enough and that Spinkellin had not been able to prove racially discriminatory intent or purpose. Id. at 615, 616.

In Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert.denied, U.S. _____, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984), the Eleventh Circuit was faced wi the same Fourteenth Amendment Equal Protection claim. In rejecting this clai

the court remarked as fcllows:

> Disparate impact alone is insufficient to establish a violation of the Fourteenth Amendment. There must be a showing of an intent to discriminate.

Id. at 1449.

In Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), application for stay denied, 464 U.S. 109 (1983), the petitioner presented the district court with the very same studies that have been relied on in the instant case. The district court denied relief and the Eleventh Circuit affirmed remarking in pertinent part as follows:

> The petitioner presents nothing more than the statistical impact type case as presented in those cases [Spinkellink and Adams]. Although there are new studies, the thrust is the same as ones previously held not sufficient to show the Florida system to

> have intentionally discriminated against petitioner.

Sullivan v. Wainwright, 721 F.2d at 318. The Eleventh Circuit denied Sullivan's petition for rehearing en banc and his application for a stay in this Court was denied. In denying the application for stay, this Court remarked as follows:

> The Florida Supreme Court and both the federal district court and the Eleventh Circuit have considered this data and determined in written opinions that it is insufficient to show that the Florida system is unconstitutionally discriminatory. On the basis of the record before this Court, we find there is no basis for disagreeing in this case with their decisions.

Sullivan v. Wainwright, 78 L.Ed.2d at 212, 2131.[1] It should be obvious that those

---

[1] See also Pulley v. Harris, U.S. ____, 79 L.Ed.2d 29 (1984), Brennan,

studies considered and rejected by this Court in Sullivan as being insufficient to show the Florida system unconstitutionally discriminatory, cannot now establish discrimination in the instant case.

The decision of the lower court cannot be sustained on the thesis that Sullivan, 721 F.2d 316, has in effect been vacated because of the pendency of Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), before the en banc court is without merit. First, rehearing en banc was denied in Sullivan. Second, Spencer is distinguishable. As noted by this court in Sullivan, 78 L.Ed.2d, at 213, n. 3, in Spencer no court had actually considered the proffered

J., dissenting, where the studies examined by the district court sub judice and the Eleventh Circuit are listed as having been filed in Sullivan v. Wainwright, 78 L.Ed.2d 210.

evidence whereas in Sullivan the evidence was available, it was considered, and it was found lacking. Just recently in Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985), the lower court again had occasion to examine the claim of statistical evidence as proof of discriminatory application of the death penalty on the basis of race. Please note:

> In McCleskey, we explained that statistical evidence of a disparate impact in the imposition of the death penalty is relevant only to the extent that it compels an inference of purposeful discrimination: [Emphasis the court's.]
>
> > [P]roof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimi-

> nation--i.e., race is intentionally being used as a factor in sentencing--can be presumed to permeate the system.

Id. at 892.

Hence, when a petitioner proffers statistical evidence of the kind relied upon by appellant in the instant case, the district court need not hold an evidentiary hearing unless the proffer demonstrates a reasonable possibility that the evidence might compel an inference of purposeful discrimination. As we stated in McCleskey:

> Needless to say, an evidentiary hearing would be necessary to hear any evidence that a particular defendant was discriminated against because of his race. But general statistical studies of the kind offered here do not even purport to prove that fact. Aside from that kind of evidence, however, it would not seem necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an

> unexplainable disparity. Generalized studes would appear to have little hope of excluding every possible factor that might make a difference between crimes and defendants, exclusive of race. To the extent there is a subjective or judgmental component to the discretion with which a sentence is invested, not only will no two defendants be seen identical by the sentencers', but no two sentencers will see a single case precisely the same. As the court has recognized, there are "countless racially neutral variables" in the sentencing of capital cases. Smith v. Balkcom, 671 F.2d [858,] 859 [(5th Cir. Unit B), cert.denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)].

Id. at 894 (emphasis added).

Id. at 1491, 1492. (Footnote omitted.) (Emphasis the courts.) It is anomalous that the Eleventh Circuit cites McCleskey

v. Kemp, 753 F.2d 877 (11th Cir. 1985), as authority for affirming a district court's denial of evidentiary hearing in a Georgia case and yet in the instant Florida case McCleskey is cited as authority for the lower court's remand with directions to hold an evidentiary hearing. It is obvious that the record before the lower court contained no evidence that respondent was discriminated against because of his race or the race of the victim; all that was submitted to the lower court were general statistical studies which do not even purport to prove a discrimination claim and have been repeatedly rejected by this Court. In the instant case the district court clearly stated in its order that only "statistical studies" had been submitted in support of the discimination claim. The

district court commented as follows:

> After reviewing petitioners' Petition and Memorandum and the studies attached thereto, this Court is of the opinion that the victim-based statistics offered in support of his claim are not substantially different from those rejected by the court in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The court in Spinkellink held that an allegation that the death penalty in Florida is being discriminatorily applied to defendants, supported only by statistical studies concerning victim impact, would not state a cognizable constitutional claim. See also Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir.), application for stay of execution denied, U.S. ____, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); Adams v. Wainwright, 709 F.2d at 1449.
>
> * * *
>
> After an examination of the various studies supplied to the court, the undersigned first concludes that the studies are insufficient to evince a purposeful discrimination against petitioner. Second, petitioner

> presents the type of victim impact studies that courts of this circuit have previously rejected. See Sullivan, 721 F.2d at 317.

Id. at 1568, 1569.

In Wainwright v. Ford ____ U.S. ____, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984), this Court was faced with an application to vacate an order by the Eleventh Circuit staying the execution of sentence of death. Ford had urged two grounds for the stay of execution: (1) currently insane and (2) discriminatory application of the death penalty on the basis of race. This Court denied the application to vacate stay of execution and in so doing had occasion to remark on Ford's discrimination claim. Please note:

> Finally we have held in two prior cases that the statistical evidence relied upon by Ford to support his claim of

> discrimination was not sufficient to raise a substantial ground upon which relief might be granted. See Sullivan v. Wainwright, U.S. ____ (1983); Wainwright v. Adams, ____ U.S. ____ (1984). I am of the opinion that the Court of Appeals abused its discretion in also granting a stay of execution on Ford's discrimination claim pending its decision in Spencer v. Zant, supra.

Id. 104 S.Ct. at 3499.

It is noted also that the district court agreed that the holding in Spinkellink had been expanded "slightly," 588 F.Supp., at 1569, by the decisions in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981)(Unit B), modified, 671 F.2d 858 (5th Cir.) (Unit B), cert.denied, 103 S.Ct. 181 (1982), and Smith v. Kemp, 715 F.2d 1459 (11th Cir.), cert.denied, 104 S.Ct. 510 (1983), while the opinion of the lower court states that the Spinkellink standard,

applied by the district court, "has been materially altered," 760 F.2d at 1518, by Smith v. Balkcom, supra. However, the district court in its order, 588 F.Supp., 1549, pointed out that the modified opinion in Smith v. Balkcom indicated that "only if the [statistical] evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice." Adams v. Wainwright, 709 F.2d at 1449, citing Smith v. Balkcom, 671 F.2d at 859.

It is submitted that McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), does not support the decision of the lower court remanding for evidentiary hearing on the discrimination issue. Please note:

> In any discretionary system, some imprecision must be tolerated, and the Baldus study is simply insufficient to

support a ruling, in the context of a statute that is operating much as intended, that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious.

This conclusion is supported, and possibly even compelled, by recent Supreme Court opinions in Sullivan v. Wainwright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983) (denying stay of execution to allow evidentiary hearing on Eighth Amendment claim supported by statistics); Wainwright v. Adams, ____ U.S. ____, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984) (vacating stay); and Wainwright v. Ford, ____ U.S. ____, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984) (denying state's application to vacate stay on other grounds). A plurality of the Court in Ford definitively stated that it had held "in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted." Id. at ____, 104 S.Ct. at 3499, 82 L.Ed.2d at 912 (citing Sullivan and

Adams). The petitioners in Sullivan, Adams, and Ford all relied on the study by Gross and Mauro of the Florida death penalty system. The bottom line figure in the Gross and Mauro study indicated a race-of-the-victim effect, quantified by a "death odds multiplier," of about 4.8 to 1. Using a similar methodology, Baldus obtained a death odds multiplier of 4.3 to 1 in Georgia.

It is of course possible that the Supreme Court was rejecting the methodology of the Florida study, rather than its bottom line. It is true that the methodology of the Baldus study is superior. The posture of the Florida cases, however, persuades this Court that the Supreme Court was not relying on inadequacies in the methodology of the Florida study. The issue in Sullivan, Adams, and Ford was whether the petitioner's proffer had raised a substantial ground sufficient to warrant an evidentiary hearing. In that context, it is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to

> state a claim. A contrary assumption, that the Supreme Court analyzed the extremely complicated Gross and Mauro study and rejected it on methodological grounds, is much less reasonable.
>
> Thus, assuming that the Supreme Court in Sullivan, Adams and Ford found the bottom line in the Gross and Mauro study insufficient to raise a constitutional claim, we would be compelled to reach the same result in analyzing the sufficiency of the comparable bottom line in the Baldus study on which McCleskey relies.

Id. at 897.

But someone may be heard to say that McCleskey had to do with the application of the Georgia death penalty and--so the reasoning goes--would not be applicable in a Florida death penalty case. Well then, let's look at a Florida case. The lower court denied rehearing and rehearing en banc in the instant case on June 21,

1985. Less than thirty days later a different panel decided Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985), decided July 17, 1985. In Thomas the identical issue was raised, i.e., Florida death penalty is unconstitutionally applied due to discrimination on the basis of race and was rejected by that court. Please note:

> Thomas argues that the Florida death penalty is unconstitutionally applied due to discrimination on the basis of race, sex, and socioeconomic status, and arbitrarily applied on the basis of geography. He claims the district court erred in failing to grant an evidentiary hearing, specific discovery, and expenses for expert assistance and witnesses. In support of his claim, Thomas proffers the same type of statistical studies rejected by this Court in Henry v. Wainwright, 743 F.2d 761, 762 (11th Cir. 1984); Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984);

> Sullivian v. Wainwright, 721 F.2d 316 (11th Cir. 1983), application for say denied, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); and Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984). The Supreme Court has likewise indicated that this claim is without merit. Wainwright v. Ford, U.S. ____, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984)(denying state's application to vacate stay on other grounds); Wainwright v. Adams, U.S. ____, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984) (vacating stay of execution); Sullivan v. Wainwright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983)(denying stay of execution). The district court properly denied Thomas' requests for an evidentiary hearing and claim for relief on this issue. [Emphasis ours]

Id. at 747, 748. Euphemistically, it is puzzling that the Eleventh Circuit would remand for evidentiary hearing on the discrimination issue in the instant case and,

yet, less than a month later affirm the district court's denial of a request for an evidentiary hearing on the same issue. And, adding insult to injury, the lower court in affirming the district court's denial of request for evidentiary hearing in Thomas, relies on substantially the same authorities that petitioner relies upon in the instant case.

The Eleventh Circuit in its opinion states that "whether an evidentiary hearing is required will depend on the presence or absence of factual issues." 760 F.2d at 1518. But this is always the case. The district court has already examined the factual issues and found them wanting as a matter of law. Is respondent to be given another bite at the apple every time the district court examines factual issues and

finds them insufficient to justify the granting of an evidentiary hearing. The Eleventh Circuit opinion does not say that the district court refused to examine any statistical study submitted by respondent; the opinion does not say that the district court is wrong as a matter of law in refusing to grant an evidentiary hearing; but simply remands and directs the district court to do again what it has already done. This is a waste of judicial energy and contrary to the decisions of this court holding that the statistical evidence relied upon by respondent to support his claim of discrimination is insufficient to raise a substantial ground upon which relief might be granted. Wainwright v. Ford, 104 S.Ct. at 3499.

## CONCLUSION

Respondent submits that this case merits summary reversal; but if the Court is not so inclined, respondent prays that the writ will be granted so that briefs on the merits may be filed.

JIM SMITH
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CERTIFICATE OF SERVICE

I hereby certify on this _____ day of October, 1985, a copy of this Petition for Writ of Certiorari was mailed, postage prepaid, to Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, New York, New York 10112, and to Mr. John D. Middleton C2, Suite IV, 4001 Newberry Road, Gainesville, Florida 32607. I further certify that all parties required to be served have been served.

WALLACE E. ALLBRITON
Assistant Attorney General

# A P P E N D I X

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Kenneth GRIFFIN,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT,
Respondent-Appellee.

No. 84-3196.

United States Court of Appeals,
Eleventh Circuit.

May 10, 1985.

Rehearing and Rehearing En Banc
Denied June 21, 1985.

State prisoner sentenced to death for killing two victims during robbery of convenience store petitioned for writ of habeas corpus. The United States District Court for the Middle District of Florida, Howard W. Melton, J., 588 F.Supp. 1549, denied the writ, and prisoner appealed. The Court of Appeals held that: (1) prisoner did not establish ineffective assistance of counsel claim; (2) District

Court did not err in refusing to grant prisoner an evidentiary hearing; (3) claim that prosecutor's reference to race as a means of identification of victims deprived defendant of due process and equal protection was barred by procedural default; and (4) imposition of death penalty was not disproportionate or excessive in relation to prisoner's participation in murders.

Affirmed in part; remanded in part.

1. Criminal Law 641.13(1)

To succeed on a claim of ineffective assistance of counsel, a convicted defendant must show that counsel's performance was deficient by proof that counsel made errors so egregious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth

Amendment; defendant must then show that the deficient performance prejudiced his defense; to satisfy second prong, defendant must demonstrate that counsel's errors were so serious as to deprive defendant of a fair trial. U.S.C.A. Const.Amend. 6.

2. Criminal Law 735, 1134(2)

A claim of ineffective assistance of counsel is a mixed question of law and fact, and in resolving such a claim, Court of Appeals must examine totality of the circumstances and the entire record.

3. Habeas Corpus 85.1(2), 90.3(5)

On writ of habeas corpus, burden rests on petitioner to establish by convincing evidence that state court findings of fact are erroneous or that one of the seven statutory conditions negating presumption of correctness which attaches to state

court factual findings exists. 28 U.S.C.A. § 2254(d).

4. Criminal Law 641.13(2)

Brevity of time spent in consultation with defendant, without more, does not establish that counsel was ineffective.

5. Criminal Law 641.13(2)

It was not enough for defendant seeking to establish ineffectiveness of counsel to allege that counsel only met with him once before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with facts of the case and law applicable to the case.

6. Habeas Corpus 90.3(5)

Habeas Corpus petitioner failed to establish by convincing evidence that

factual determination of state court that his counsel spent sufficient time with petitioner to prepare an adequate defense and to thoroughly familiarize himself with the facts of the case and applicable law was erroneous. 28 U.S.C.A. § 2254(d).

7. Criminal Law 641.13(6)

Fact that counsel failed to appear at 14 depositions did not establish ineffective assistance of counsel, where counsel was not given notice of seven of the depositions, and counsel testified that he decided not to attend the other depositions because of his belief that counsel for codefendant would adequately represent defendant's interest; moreover, counsel secured and used copies of the latter depositions in preparation for trial.

8. Criminal Law 641.13(6)

Counsel's failure to redepose two witnesses, after missing their depositions, did not constitute ineffective assistance, where counsel did not redepose one witness because counsel had benefit of witness' deposition and did not want to afford witness a chance to rehabilitate prior statements made in earlier deposition, and counsel did not redepose second witness because in addition to deposition of witness, counsel had copy of witness' lengthy statement which counsel deemed sufficient.

9. Criminal Law 641.13(6)

It cannot be said that counsel was ineffective in failing to question potential witnesses, where counsel, prior to trial, conferred with three potential

witnesses, and counsel testified that defendant never informed counsel of other potential witnesses.

10. Criminal Law 641.13(6)

Defense counsel's failure to call witness in murder prosecution, who would have testified that defendant was an excellent and willing worker, that he was well disciplined, and never displayed any violent tendencies, did not establish ineffective assistance of counsel.

11. Criminal Law 641.13(1)

Sixth Amendment right to effective assistance of counsel does not mandate that counsel raise every conceivable objection without regard to its merits. U.S.C.A. Const.Amend. 6.

12. Criminal Law 641.13(2)

Defense counsel could not be deemed ineffective for his failure to raise a tenuous objection to prosecutor's remarks identifying victims' race, where two references to victims' race were made during voir dire and were made entirely for identification purposes, and two other references, for the exact same purpose, were made during prosecution's opening statement, and once during questioning of witness.

13. Criminal Law 641.13(1)

While reviewing ineffective assistance of counsel claims, Court of Appeals does not sit to second guess considered professional judgment with benefit of 20/20 hindsight.

14. Criminal Law 641.13(1)

Possibility that other lawyers may have employed another strategy does not automatically mandate a finding of constitutionally ineffective representation.

15. Criminal Law 641.13(6)

Counsel, in order to be effective, need not submit to jury all arguably mitigating character evidence that might exist.

16. Habeas Corpus 25.1(6)

When a lawyer makes an informed choice between alternatives, his tactical judgment will almost never be overturned on habeas corpus.

17. Criminal Law 641.13(1)

Counsel will not be regarded as constitutionally deficient merely because

of tactical decisions.

18. Criminal Law 641.13(7)

Facts that counsel failed to present a viable case in mitigation at penalty stage of murder prosecution did not establish ineffective assistance of counsel, where counsel explored and examined possibility of using character and background evidence at penalty stage, and making a strategic choice not to present mitigating character and background testimony, but instead to present mitigating evidence that defendant's potential release, under a life imprisonment sentence, would not pose a danger to the community.

19. Criminal Law 1077.3

Defendant has right to effective assistance of counsel on appeal, but counsel need not brief issues reasonably

considered to be without merit.

20. Criminal Law 1077.3

Appellate counsel was not deficient in failing to raise prosecutorial misconduct claim on direct appeal, as claim could reasonably be considered to be without merit.

21. Habeas Corpus 45.3(1.30), 90.3(5)

A federal habeas corpus petitioner must make a showing of two elements in order to receive an evidentiary hearing on ground that material facts were not adequately developed at state court hearing; petitioner must establish that a fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing and that the fact was "material" or "crucial to a fair, rounded development of the material facts"; petitioner must also

demonstrate that failure to develop the material fact at the state court proceeding was not attributable to petitioner's inexcusable neglect or deliberate by-pass.

22. Habeas Corpus 90.2(3)

Habeas corpus petitioner was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel on ground that material facts were not adequately developed at state court hearing, notwithstanding his claim that he was denied a full and fair opportunity to present evidence in form of record of prison visitors which would corroborate his testimony that trial counsel was ineffective because he met with him only once prior to trial, where petitioner failed to establish that his failure to present record at state proceeding was not

due to his own inexcusable neglect or deliberate bypass.

23. Habeas Corpus 85.1(2)

District court in habeas corpus proceeding did not err or abuse its discretion in granting a presumption of correctness to facts found in state evidentiary hearing, notwithstanding petitioner's claim that state trier of fact did not afford petitioner a full and fair fact hearing on ineffective assistance of counsel claim. 28 U.S.C.A. § 2254(d).

24. Habeas Corpus 45.3(1.40)

District court in habeas corpus proceeding correctly concluded that petitioner's claim of unconstitutional impanelment of jury was barred because petitioner failed to raise it on direct appeal as state procedure required.

25. Habeas Corpus 45.3(1.50)

Notwithstanding an independent and adequate state procedural bar, Court of Appeals may review merits of habeas corpus petitioner's claim if he can show both cause excusing and actual prejudice resulting from waiver of claim.

26. Habeas Corpus 45.3(1.40)

District court's order denying habeas corpus petitioner's motion for evidentiary hearing on his claim of unconstitutional impanelment of jury was proper, where evidence proffered by petitioner was wholly insufficient to establish cause excusing and actual prejudice resulting from his failure to raise issue on direct appeal as required by state procedure.

27. Habeas Corpus 45.3(9)

Where state courts denied relief on

habeas corpus petitioner's claim that death penalty was discriminatorily imposed based on race of victim without an evidentiary hearing on grounds that it, along with other claims, was insufficient on its face to state a claim for relief, claim was exhausted.

28. Habeas Corpus 45.3(1.40)

District court in habeas corpus proceeding properly declined to hold an evidentiary hearing on claims that petitioner was denied his right to an impartial jury and that prosecutor's reference to race as a means of identification of victims deprived petitioner of due process and equal protection of the laws, where issues were not raised by petitioner in his direct appeal to Supreme Court of Florida and thus

claims were barred by procedural default under Florida and federal law. U.S.C.A. Const. Amend. 14.

29. Habeas Corpus 43.3(1.30)

Failure to raise an issue on appeal may preclude federal habeas corpus review.

30. Habeas Corpus 45.3(4)

Issue of whether habeas corpus petitioner's punishment was cruel and unusual under Eighth and Fourteenth Amendments was an exhausted issue and properly before Court of Appeals on its merits, where, although petitioner did not raise issue on direct appeal, he raised issue in a collateral attack, by arguing it in his brief to Supreme Court of Florida. U.S.C.A. Const. Amends. 8, 14.

31. Constitutional Law 270(1)

Criminal Law 1213.8(8)

Imposition of death penalty was not disproportionate and excessive in violation of Eighth and Fourteenth Amendments, notwithstanding claim that conviction might have been based solely on jury's belief that defendant was an accomplice to a felony-murder, where evidence was more than sufficient to support a finding that defendant personally killed victims in course of convenience store robbery by willfully shooting them. U.S.C.A. Const. Amends. 8, 14.

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Patterson, Bleknap, Webb, & Tyler, Fred Davis, New York City, for petitioner-appellant.

Jim Smith, Atty. Gen., State of Fla., Wallace Allbritton, Tallahassee, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and HATCHETT, Circuit Judges, and HANCOCK, District Judge.

PER CURIAM:

In this death penalty case, we review the district court's order denying appellant, Kenneth Griffin's, application for a stay of execution and petition for writ of habes corpus pursuant to 28 U.S.C.A. § 2254 (West 1977). We affirm in part and remand in part.

BACKGROUND

On March 15, 1979, appellant, Kenneth Griffin, was convicted of killing two young men during the robbery of a convenience store. In accordance with the jury's recommendation, the trial court imposed the death sentence. On direct appeal, the Supreme Court of Florida affirmed Griffin's

conviction and sentence of death. See Griffin v. State, 414 So.2d 1025 (Fla. 1982) (Griffin I).

On April 20, 1983, Griffin collaterally attacked his conviction and sentence. In doing so, Griffin filed a Motion to Vacate, Set Aside or Correct Conviction and Sentence and Order a New Trial. Griffin later amended and supplemented the aforementioned motion. On February 21, 1984, the Governor of Florida signed a death warrant which ordered that Griffin be executed on March 19, 1984.

On March 9, 1984, the state trial court held an evidentiary hearing on Griffin's claim of ineffective assistance of trial counsel, but denied the remainder of Griffin's claims as barred by procedural default.

After the evidentiary hearing, the state trial court entered an opinion denying Griffin's motion for post conviction relief under Florida Rule of Criminal Procedure 3.850. From this adverse ruling, Griffin filed in the Supreme Court of Florida a petition for writ of habeas corpus, an application for stay of execution, and an appeal from the trial court's order denying the amended motion.

On March 16, 1984, the Supreme Court of Florida affirmed the trial court's order and, thereby, denied the petition for writ of habeas corpus and the application for stay of execution. Griffin v. State, 447 So.2d 875 (Fla. 1984) (Griffin II). That same day, Griffin filed in the United States District Court for the Middle District of Florida an application for a

stay of execution and a petition for a writ of habeas corpus.

After granting a temporary stay of execution and reviewing the entire record, the district court denied Griffin's petition for writ of habeas corpus and application for a stay of execution, 588 F.Supp. 1549. The district court, thereafter, ruled that its temporary stay of execution would remain in full force and effect until 7 a.m. Friday, March 23, 1984, to allow Griffin an opportunity to appeal the court's decision. Additionally, pursuant to 28 U.S.C.A. § 2253 (West 1971), the district court granted Griffin a certificate of probable cause to appeal.

ISSUES

We must determine: (1) whether Griffin received ineffective assistance of counsel;

(2) whether the district court erred in refusing to grant Griffin an evidentiary hearing; (3) whether the prosecutor's reference to race as a means of identification deprived Griffin of due process and equal protection of the laws; (4) whether Griffin's capital sentence is unconstitutional under the principles of Emmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (5) whether Griffin was denied his right to an impartial jury; and (6) whether the death penalty has been discriminatorily imposed against Griffin in this case.

DISCUSSION

I. Ineffective Assistance of Counsel

Appellant, Kenneth Griffin, contends that his counsel, a special public defender assigned to represent him, did not provide

effective assistance of counsel at pretrial, trial, penalty proceedings, and on appeal. Thus, Griffin contends that he was deprived of effective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution. The state trial court, the Supreme Court of Florida, and the United States District Court for the Middle District of Florida have all held that this claim is without merit. We agree.

Griffin enumerates the following areas of alleged deficiencies in his counsel's performance: (1) failure to meet with him; (2) failure to attend depositions; (3) failure to object to irrelevant and prejudicial racial remarks made by the prosecutor at trial; (4) failure at the penalty stage to present a case in

mitigation; and (5) failure to raise the prosecutorial misconduct claim on direct appeal.

[1] In Strickland v. Washington, U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court articulated the test under which claims of ineffective assistance of counsel are reviewed. First, a convicted defendant must show that counsel's performance was deficient. This, however, requires proof that counsel made errors so egregious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the convicted defendant must show that the deficient performance prejudiced his defense. To satisfy this second prong, the defendant must demonstrate that counsel's error were so serious as to deprive the

defendant of a fair trial. Strickland, ____ U.S. at ____, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. After enunciating this two-prong test, the court unequivocally stated that unless a defendant satisfies this test, he fails to demonstrate that counsel's assistance was so defective as to require reversal of his conviction or death sentence. Strickland, ____ U.S. at ____, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

[2] Accordingly, before we can reverse Griffin's conviction or death sentence, Griffin must establish that his counsel was ineffective and that actual prejudice resulted therefrom. Griffin's claim of ineffective assistance of counsel is a mixed question of law and fact. Cuyler v. Sullivian, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Washington v. Watkins,

655 F.2d 1346, 1354 (5th ir. 1981). In resolving Griffin's claim, we must examine the totality of the circumstances and the entire record. Palmes v. Wainwright, 725 F.2d 1511, 1519 (11th Cir. 1984) (citing Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983)).

[3] A writ of habeas corpus issued pursuant to 28 U.S.C.A. § 2254 (West 1977) in effect vacates either the factual or legal conclusion reached by the state court system under which the petitioner was convicted. Congress, however, in 28 U.S.C.A. § 2254(d) intended not only to minimize the inevitable friction between the state and federal courts, but to mandate that factual findings made by the state court system "shall be presumed to be

correct." This presumption of correctness attaches unless one of seven conditions specifically set forth in 28 U.S.C.A. § 2254(d)[1] is found to exist by the federal

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1. Title 28 U.S.C.A. § 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

habeas corpus court or the court concludes

> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or

that the relevant state court determination is not "fairly supported by the record." Title 28 U.S.C.A. § 2254(d)(8). On appeal, the burden rests upon the appellant to establish by convincing evidence that the state court findings of fact are erroneous or that one of the seven conditions set forth in 28 U.S.C.A. § 2254(d) exists. Sumner v. Mata, 449 U.S. 539, 550, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981). With these principles in mind, we now

more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

examine Griffin's claim of ineffective assistance of counsel.

A. Pretrial Stage

Griffin contends that he was denied the effective assistance of counsel because his trial counsel failed to conduct adequate pretrial investigation. Specifically, Griffin alleges that his counsel: (1) spent virtually no time with Griffin prior to trial; (2) failed to ask Griffin about key witnesses in the case; (3) failed to ask Griffin about the identity or existence of witnesses with exculpatory and mitigating evidence; (4) failed to question potential witnesses; and (5) failed to attend fourteen pretrial depositions taken by counsel for co-defendant Robert John Hinson and by the state.

1. Pretrial Investigation

Griffin contends that his counsel's assistance at the pretrial stage of the proceedings was deficient and prejudicial to his defense. In sum, Griffin alleges that his counsel failed to meet with him and to investigate the facts underlying the indictment. At the state court evidentiary hearing, Griffin testified that his counsel never saw him until two weeks prior to the trial. The state court found that this testimony was "untruthful." The Supreme Court of Florida affirmed the trial court's order.

[4,5] Brevity of time spent in consultation, without more, does not establish that counsel was ineffective. Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). Thus, it is not enough for Griffin

to allege that counsel only met with him once before trial "as long as counsel devoted sufficient time to ensure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case." Easter v. Estelle, 609 F.2d at 759.

At the state court habeas corpus hearing, counsel for Griffin testified that "with the time that I interviewed Mr. Griffin, there was plenty of time, with the information that I got from him, there was time to do anything I could have done with it." After receiving evidence on Griffin's ineffective assistance of counsel claim, the state trial court found that Griffin suffered no actual or substantial detriment. The court concluded that Griffin's constitutional right to effective

assistance of counsel was not violated. The Supreme Court of Florida affirmed. (Griffin II at 884.)

On federal habeas corpus, the district court, after a thorough review of the entire record, found that counsel for Griffin did "spend sufficient time to develop an adequate defense." Thus, the district court concluded that the state court's factual determination wa "fairly supported by the record." Sumner v. Mata, 449 U.S. at 550, 101 S.Ct. at 770.

In sum, the district court did not find that any of the seven conditions set forth in section 2254(d) existed. The district court, however, did find that the state court determination was supported by the record. Title 28 U.S.C.A. § 2254(d)(8). The burden, therefore, rests on Griffin,

whose case has run the entire gamut of the state judicial system, to establish "by convincing evidence that the factual determination of the State court was erroneous." Title 28 U.S.C.A. § 2254(d).

[6] Like the district court, we are not convinced that counsel for Griffin did not spend sufficient time with Griffin to prepare an adequate defense and to thoroughly familiarize himself with the facts of the case and the applicable law. Correspondingly, we reject Griffin's claim of ineffective assistance of counsel on this ground inasmuch as Griffin has not shown that the state and district court findings on this issue are erroneous.

### 2. Counsel's Failure to Attend Depositions and Question Potential Witneses

[7] Griffin contends that the complete inadequacy of his counsel's pretrial preparation is evidenced by his counsel's failure to appear at fourteen depositions. The state court found, and the district court agreed, that Griffin's counsel was not given notice of seven depositions sechedule on December 27, 1978. As for the other seven depositions which he did not attend, Griffin's counsel testified that he decided not to attend the depositions because of his belief that counsel for Griffin's co-defendant, Hinson, would adequately represent Griffin's interest. Griffin's counsel, however, secured and used copies of these depositions in preparation for trial.

[8] Additionally, the state court found, and the district court concurred, that Griffin's counsel, after missing the depositions of witnesses Bryant and Henry, did not redepose these witnesses for sound strategic reasons. Counsel did not redepose Henry because counsel had the benefit of Henry's deposition and did not want to afford Henry a chance to rehaibilitate prior statements made in his earlier deposition. At trial, counsel used Henry's deposition for impeachment purposes. Counsel did not redepose Bryant because in addition to the deposition of Bryant, counsel had a copy of Bryant's lengthy statement. Counsel deemed sufficient the information contained in these documents.

[9] The state court found that prior to trial, counsel conferred with potential witnesses such as Carter, Cooter, and Bryant. The state court also found that counsel had an investigator who assisted him in pretrial discovery. As for other potential witnesses with exculpatory and mitigating evidence, counsel testified, and the state court found, that Griffin never informed counsel of other potential witnesses. Griffin has not shown that he state court's findings are erroneous or that he was prejudiced by his trial counsel's deficient performance.

[10] This claim really reduces itself to counsel's failure to call Crosby, who would have testified that Griffin was an excellent and willing worker, that he was well disciplined, and never displayed any

violent tendencies. Counsel, of course, is never required to call every possible witness. Surely, counsel is not required to call a witness to testify to facts such as lack of violent nature when the jury has rejected such an approach and has found that the defendant is guilty of murder. We, therefore, reject Griffin's claim that he received ineffective assistance of counsel because his counsel failed to attend specified depositions and question potential witnesses.

B. Trial

Griffin asserts that his trail counsel was ineffective because he faile to object to prejudicial recial remarks made by the prosecutor. Griffin points to the prosecutor's five references to the victim(s) as "white male boy," "white boy,"

or "white males" in an 844 page trial transcript. The state court found that two references to the victims' race were made during voir dire and that "these were made entirely" for identification purposes. Additionally, the state court found that two other references, for the exact same purpose, were made during the prosecution's opening statement, and once during questioning of witness Bryant. Griffin II at 882. After a careful review of the entire record, the state court concluded, and the district court concurred, that "this trial was conducted unblemished by any racial slurs or inferences." Griffin II at 882. We agree.

[11, 12] We acquiesce in the state and district courts' findings that the prosecutor made the references to the

victims' race for identification purposes. The sixth amendment right to effective assistance of counsel does not mandate that counsel raise every conceivable objection without regard to its merits. Griffin's trial counsel, therefore, cannot be deemed ineffective for his failure to raise a tenuous objection to the prosecutor's remarks. Palmes v. Wainwright, 725 F.2d 1511, 1522-23 (11th Cir. 1984). Given the totality of the circumstances, it is clear that counsel was "reasonably effective" even though he did not object to the prosecutor's references to the victims' race.

C. Penalty Stage

Griffin also contends that his counsel was deficient in the presentation of the case in mitigation at the penalty stage.

Griffin argues that his counsel failed to present a viable case in mitigation, despite the fact that a number of individuals were willing and available to provide precisely the type of information relevant to an effective mitigation presentation. This argument misses the mark.

[13, 14] While reviewing ineffective assistance of counsel claims, this court does not sit to second guess considered professional judgment with the benefit of 20/20 hindsight. Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir. 1981), cert.denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). Indeed, we have continuously held that counsel will not be deemed constitutionally deficient merely because of tactical decisions. Ford v.

Strickland, 696 F.2d 804 (11th Cir. 1983); United States v. Guerra, 628 F.2d 410 (5th Cir. 1980), cert. denied, 450 U.D. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978). Notwithstanding the possibility that other lawyers may have employed another strategy, a finding of constitutionally ineffective representation is not automatically mandated. Baty v. Balkcom, 661 F.2d 391, 395 n. 8 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir. 1981).

[15] Established legal precedent does not require that counsel, in order to be effective, submit to the jury all arguably mitigating character evidence that might

exist. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (by implication). Moreover, in Stanley v. Zant, 697 F.2d 955 (11th Cir.1983), this court expressly stated that in some cases:

> [C]ounsel could reasonably conclude that such evidence [character evidence] would be of little persuasive value or that it would cause more harm than good by opening the door for harmful cross-examination or rebuttal evidence .... Having conducted a sufficient investigation, counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation.

Stanley, 697 F.2d at 965.

[16] Similarly, in Williams v. Maggio, 679 F.2d 281 (5th Cir.1982) (en banc), the petitioner argued that his trial counsel was ineffective because counsel failed to conduct an adequate investigation, the

results of which would allegedly have been the discovery of favorable character witnesses. Petitioner also argued that his counsel had not prepared properly for the sentencing hearing inasmuch as he failed to interview six readily available character witnesses for mitigation purposes. After evaluating the affidavits and evidence presented by petitioner, the Williams court concluded that what "petitioner's present counsel is really objecting to is the trial strategy employed by trial counsel. We do not elect to second guess the trial strategy decisions of competent counsel." Williams, 679 F.2d at 392. When a lawyer makes an informed choice between alternatives, his tactical judgment will almost never be overturned on habeas corpus. Stanely v. Zant, 697 F.2d at 966.

At the state court hearing, counsel for Griffin testified, and the state and district courts found, that counsel was familiar with Griffin's background as a result of discussions with Griffin and an investigation by an associate in counsel's law office. Moreover, the court's concur that counsel made a strategic decision not to present mitigating character and background testimony. Instead, counsel chose to present mitigating evidence that Griffin's potential release, under a life imprisonment sentence, would not impose a threat of danger to the community.

At the state court hearing, Griffin's counsel testified:

> My deicision, in this case, after living with it for a period of time and after seeing the testimony that had been presented, that, once the jury had made the determination that Mr. Griffin was, in fact, guilty, that background of Mr. Griffin, whether it be bad or poor or rotten or how grievous a life he may have been brought up in, was not going to make a difference to [the jury].....
>
> The only place I had to go with that was, and it was in the record, that Mr. Griffin wa a good inmate, when he had been in the prison system, that he hadn't given any problems and that he was not going to give any problems out there if they voted for the life sentence.
>
> And that, if he got out of the prison system, which is what people up here are concerned about because they live here every day, if he ever got out of the system, he is not going to harm anybody else.
>
> So, that was my decision and I think that, to have come up with a sympathy type argument, saying that: 'Unfortunately, because he had such a poor life or bad life, that you don't vote for the death penalty.'

> Now, I felt that that would have just taken credibility away from any case that we had.

Later in the state evidentiary hearing, counsel further testified:

> I felt at that point that, with the type of crime that was being tried ... that the jury, who had convicted Mr. Griffin on that, that they weren't going to be impressed at all with his background unless there was some mental instability there. The main thing that they were concerned about is what has happened to this community and what has happened to them again when they go out again.

[17, 18] The record suggests that Griffin's counsel explored and examined the possibility of using character and background evidence at the penalty stage, but made an informed choice between reasonable alternatives. It is well-settled law that counsel will not be regarded constitutionally deficient merely because of tactical decisions. Ford v.

Strickland, 696 F.2d 804 (11th Cir.1983), cert. denied, ____ U.S. ____, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); United States v. Guerra, 628 F.2d 410 (5th Cir.1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981). Accordingly, Griffin has not carried his burden of proving ineffective assistance of counsel.

D. Appellate Stage

Griffin also contends that his appellate counsel was deficient in failing to raise the prosecutorial misconduct claim on direct appeal. Succinctly stated, Griffin argues that the prosecutor's "improper racial remarks" should have been raised as prosecutorial misconduct on direct appeal in the state court.

[19, 20] Established legal precedent provides that a defendant has the right to

effective assistance of counsel on appeal. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.1984). Nonetheless, counsel need not brief issues reasonably considered to be without merit. Alvord, 725 F.2d at 1291 (citing Mendiola v. Estelle, 635 F.2d 487, 491 (5th Cir.1981)); Hooks v. Roberts, 480 F.2d 1196, 1197-98 (5th Cir.1973), cert. denied, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). We, like the state and district courts, conclude that the prosecutor's reference to the race of the victims did not constitute objectionable prosecutorial misconduct. Finding Griffin's argument to the contrary without merit, and recognizing that "counsel need not brief issues reasonably considered to be without merit," we hold that Griffin has not carried his

burden of proving ineffective assistance of counsel on appeal.

Moreover, in addition to our holding that counsel rendered reasonably effective assistance, we find that Griffin did not suffer prejudice entitling him to relief. Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Griffin has not shown that his counsel's failure to meet with him more frequently, failure to attend depositions, failure to object to references made to the victims' race, failure to present character evidence at the penalty phase, or failure to appeal the prosecutor's reference to the victims' race, constituted an actual or substantial disadvantage to Griffin. We hold that Griffin has not carried his burden of proving that he received

ineffective assistance of counsel at any stage of this case. See United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 294 (1981).

II. The District Court's Failure to Grant Griffin an Evidentiary Hearing

Griffin also contends that the district court erred in not granting him an evidentiary hearing on his claim of ineffective assistance of counsel. Although acknowledging that the issue of ineffective assistance of counsel was the subject of a state habeas corpus proceeding, Griffin argues that the facts crucial to a fair determination of the material issues were not adequately developed at the state proceeding. Griffin further contends that he was wrongfully

denied a full and fair evidentiary hearing in the state court proceeding. Moreover, Griffin argues that because "material facts were not adequately developed at the state court hearing," and because this omission was not his fault, the district court erred in failing to hold an evidentiary hearing on his claim of ineffectiveness of counsel.

In Mason v. Balkcom, 531 F.2d 717, 722 (5th Cir.1976), this court's predecessor observed that specific historical facts found by a state habeas corpus court (such as what an attorney did for his client), merit section 2254(d)'s presumption of correctness in a federal habeas corpus proceeding provided that those facts are adequately and fairly supported by the record.

In this case, the state habeas corpus court made the factual finding that Griffin's counsel made a "tactical decision" to forego presentation of character and background evidence at the penalty stage of the trial. The court concluded that the decision did not constitute ineffective assistance of counsel. Second, the state habeas corpus court found that Griffin's counsel's failure to object to the prosecutor's reference to the victims' race did not constitute ineffective assistance of counsel inasmuch as the references were made entirely for identification purposes. Third, as for counsel's performance during pretrial investigation, the state habeas corpus court found that the evidence admitted at the evidentiary

hearing constituted plausible and reasonable grounds for counsel's conscious determination not to take further depositions.

Nevertheless, Griffin contends that the district court erred in denying him an evidentiary hearing on his claim of ineffective assistance of counsel. Griffin argues that he made the requisite showing in the district court: (1) that material facts were not adequately developed at the state court hearing; and (2) that he did not receive a full and fair hearing at his state habeas corpus proceeding. In Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the Supreme Court held that "a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing

reliably found the relevant facts." Townsend, 372 U.S. at 312, 83 S.Ct. at 756. (emphasis added). The court articulated six circumstances in which a full plenary evidentiary hearing would be required even though the state court had made findings of fact.[2] As its fifth

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2. The standards applicable to evidentiary hearings involving material facts not adequately developed at the state proceeding are governed by Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and subsection (d) of the federal habeas corpus statute, 28 U.S.C.A. § 2254 (West 1977). The Townsend Court articulated the criteria for determining when a federal district court, on habeas corpus review, is required to hold an evidentiary hearing and when the holding of said hearing is discretionary. In 1966, Congress added subsection (d) to 28 U.S.C.A. § 2254. The section provides that a state factual determination that is supported by reliable and adequate written record shall be presumed correct unless the petitioner can establish or it appears that the state proceeding was insufficient in one of eight specified ways. Amendment (d)

enumerated circumstance, the Court stated that an evidentiary hearing must be held whenever "the material facts were not adequately developed at the state court

virtually retained all of the Townsend categories and added several other categories. To be sure, Townsend and section 2254(d) complement each other. See generally Thomas v. Zant, 697 F.2d 977 (11th Cir.1983).

The Townsend Court observed that:

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313, 83 S.Ct. at 757.

hearing." Townsend, 372 U.S. at 313, 83 S.Ct. at 757.

[21] Accordingly, a federal habeas corpus petitioner, such as Griffin, must make a showing of two elements in order to receive an evidentiary hearing on the fifth circumstance articulated in Townsend: First, petitioner must establish that a fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing and that the fact was "material" and "crucial to a fair, rounded development of the material facts"; second, petitioner must demonstrate that failure to develop that material fact at the state court proceeding was not attributable to petitioner's inexcusable neglect or deliberate bypass. Thomas v. Zant, 697 F.2d 977 (11th Cir.1983).

[22] Griffin contends that he was denied a full and fair opportunity to present evidence in the form of the Florida State Prison's record of prison visitors. He adds that the aforementioned record constitutes a document material to his constitutional claim of ineffective assistance of counsel. Griffin argues that the prison's record corroborates his testimony that his trial counsel was ineffective because he met with Griffin only once prior to trial.

Even assuming, without deciding, that the Florida State Prison record contains facts that are "material" or "crucial to a fair, rounded development of the material facts," Griffin has not established that his failure to present this record, at the state proceeding, was not due to his own

inexcusable neglect or deliberate bypass.

Griffin states that it took two and one-half months for the Florida State Prison to respond to his request to produce its record of visitors. The state evidentiary hearing terminated prior to Griffin's receipt of the records. Thus, Griffin argues that his failure to develop additional evidence as to his counsel's ineffectiveness was not due to any decision on his part, but rather to the lack of time allowed by the court.

Griffin, however, has not shown that he utilized any means more stringent than a mere "request" to obtain the record(s) in question. He does not even suggest that he subpoenaed these "material" and "crucial" documents or that he sought judicial intervention to obtain them. Although

faced with imminent execution, Griffin did not petition the court for aid in obtaining records that he now claims were "material" and "crucial" to a fair development of the facts of his claim. Accordingly, Griffin has not shown, and we, therefore, are not convinced, that any failure to develop alleged "material" facts at the state proceeding is not attributable to Griffin's own inexcusable neglect or deliberate bypass. We hold that the district court properly concluded that Griffin was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel based on the fifth circumstance of Townsend.

[23] Second, Griffin contends that he is entitled to an evidentiary hearing under the sixth circumstance delineated by the

Townsend Court. Griffin alleges that he was wrongfully denied a full and fair evidentiary hearing in state court, and thus, the district court erred in not granting an evidentiary hearing on his ineffective assistance of counsel claim. The Townsend Court held that "a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts." Townsend, 372 U.S. at 312, 83 S.Ct. at 756.

If a district court concludes that "the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing." Townsend, 372 U.S. at 318, 83 S.Ct. at 760. After a review of

the entire record of the state habeas corpus proceeding, the district court found that Griffin received a full, fair, and adequate hearing before the trial judge. Because Griffin has not shown that any of the factors enumerated in Townsend or delineated in 28 U.S.C.A. § 2254(d) exist, we hold that the district court did not err or abuse its discretion in granting a presumption of correctness to the facts found in the state evidenctiary hearing. Accordingly, we reject Griffin's contention to the contrary.

III. Evidentiary Hearing-Other Grounds

Griffin contends that the state trial court wrongfully deprived him of a hearing with respect to his unconstitutional impanelment of the jury claim. He further

argues that this claim is not barred by procedural default under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). We disagree.

[24] Thorough review of the record reveals that Griffin failed to raise, on direct appeal, his unconstitutional impanelment of the jury claim. The district court correctly concluded that this claim was barred under Wainwright v. Sykes because Griffin failed to raise it on direct appeal as Florida procedure requires. See Sullivan v. Wainwright, 695 F.2d 1306, 1310 (11th Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983).

[25, 26] Notwithstanding this independent and adequate state procedural bar, we may review the merits of Griffin's

claim if he can show both cause excusing and actual prejudice resulting from the waiver of the aforementioned claim. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Francis v. Henderson, 425 U.S. 536, 542, 96 S.Ct. 1708, ____, 48 L.Ed.2d 149 (1976)(by implication). The evidence proffered by Griffin is wholly insufficient to establish cause excusing and actual prejudice resulting from Griffin's failure to raise the issue of unconstitutional impanelment of the jury on direct appeal. Accordingly, we affirm the district court's order denying Griffin's motion for an evidentiary hearing on this issue.

## IV. Discrimnatory Imposition of the Death Penalty on the Basis of the Race of the Victim

Griffin argues that the death penalty in Florida is discriminatorily imposed based on the race of the victim, and that the district court erred in denying him a hearing on this claim. The state habeas corpus court and the Supreme Court of Florida found that this issue was barred by procedural default. On federal habeas corpus, however, the district court found that Henry v. State of Florida, 377 So.2d 692 (Fla. 1979), dictated a different result. We agree.

In Henry, the Supreme Court of Florida held that a petitioner's contention that the death penalty is unconstitutionally applied in Florida "can properly be raised ... in a proceeding for post conviction

relief." Henry, 377 So.2d at 692. Griffin's claim of unconstitutional application of the death penalty was properly placed before the state courts in Griffin's petition for post-conviction relief.

[27] Although the state courts did not pass directly on the merits of the discrimination claim, the state courts had the first opportunity to hear this claim; they were apprised of the facts and the legal theory upon which Griffin based his assertion; and they disposed of this claim. See Picard v. Conner, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512-13, 30 L.Ed.2d 438 (1971); Westbrook v. Zant, 704 F.2d 1494 (11th Cir.1983); and Buck v. Green, 743 F.2d 1567 (11th Cir.1984). The state courts denied relief on this claim without

an evidentiary hearing on the grounds that it, along with other claims, was "insufficient on its face to state a claim for relief." Griffin v. State, 447 So.2d 875, 876 (Fla.1984). Accordingly, this is an exhausted claim.

Griffin has not been afforded an evidentiary hearing on the discrimination issue in either the state courts or the federal courts. The district court denied Griffin's discrimination claim stating: "The court in Spinkellink concluded that to state proper constitutional claim under this theory, a petitioner must also show that Florida's death penalty system specifically and intentionally discriminated against him, either because of his own race or the race of his victim." The Spinkellink standard, applied

by the district court, has been materially altered by Smith v. Balkcom, 671 F.2d 858 (5th Cir. Unit B), 677 F.2d 20 (5th Cir. United B), cert.denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); and our recent en banc opinion in McCleskey v. Kemp, 753 F.2d 877 (11th Cir.1985). In McCleskey, we stated: "Spinkellink can not be read to foreclose automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute." McCleskey, at 891. Because the standard to be applied to a claim of discrimination in imposition of the death penalty has been materially changed, and because no evidentiary hearing was conducted in this case, we remand the case to the district court for consideration of this issue in light of our

recent en banc holdings in McCleskey and Ross v. Kemp, 756 F.2d 1483 (11th Cir.1985)[3]. We do not imply that the district court must necessarily hold a full evidentiary hearing on this issue; whether an evidentiary hearing is required will depend on the presence or absence of factual issues.

V. Procedural Default

[28] Finally, Griffin contends: (1) that he was denied his right to an impartial jury and (2) that the prosecutor's reference to race as a means of identification deprived Griffin of due process and equal protection of the laws. Respondent, Wainwright, contends that these

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3. In both cases the studies were limited to findings in Georgia.

issues were not raised by Griffin in his direct appeal to the Supreme Court of Florida, and thus, these claims are barred by procedural default under Florida and federal law. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Spinkellink v. State, 350 So.2d 85 (Fla.1977); Silva v. State, 259 So.2d 153 (Fla.1972). The Supreme Court of Florida acquiesced. Griffin II. Because Griffin has not shown "cause and prejudice" to render the procedural bar erected in Wainwright v. Sykes inapplicable in this case, we hold that the district court properly declined to hold an evidentiary hearing on these issues or to consider the

issues on their merits. Sullivan v. Wainwright, 695 F.2d 1306, 1310 (11th Cir.) cert. denied, ____ U.S. ____, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983).

VI. The Death Penalty-Jury Instructions on Both Premeditated and Felony Murder

Griffin contends that because the jury was instructed as to both felony murder and premeditated murder, but returned only a general verdict of guilty, he cannot lawfully receive a death sentence under the principles of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In support of this argument, he asserts that his conviction may have been based solely on the jury's belief that he was an accomplice to a felony murder. Griffin, therefore, maintains that the imposition of the death penalty is both

disproportionate and excessive in violation of the eighth and fourteenth amendments.

[29] Griffin did not present this argument to the Supreme Court of Florida on direct appeal. It is well-settled law that hte failure to raise an issue on appeal may preclude federal habeas corpus review. King v. Strickland, 714 F.2d 1481 (11th Cir.1983) (citing Huffman v. Wainwright, 651 F.2d 347 (5th Cir.1981).

[30] Griffin, however, unlike the petitioner in Strickland, has proffered justification for not raising this issue, so as to excuse his procedural default. The record reveals that Griffin's trial began March 12, 1979, and Griffin's direct appeal was decided by the Supreme Court of Florida on April 8, 1982. The Supreme Court of Florida denied rehearing on June

28, 1982. The United States Supreme Court decided Enmund on July 2, 1982. Because the Supreme Court had not yet articulated the metes and bounds of the legal fence now erected by the Court's decision in Enmund, Griffin asserts that he has sufficient "cause" for failing to raise his Enmund claim on direct appeal. Griffin also asserts that actual prejudice is inherent in the fact that, even if he had desired to do so, he realistically could not have raised his Enmund claim on direct appeal. On collateral attack, however, Griffin raised the issue by arguing it in his brief to the Supreme Court of Florida. Accordingly, we conclude that the issue of whether Griffin's punishment is cruel and unusual under the eighth and fourteenth amendments is an exhausted issue and

properly before this court on its merits.

[31] After reviewing the relevant evidence in this claim, we, like the district court, are compelled to hold against Griffin. Griffin relies on Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). We, however, disagree with Griffin's reading of Enmund and his interpretation of the evidence in this case.

The facts of Enmund are sharply distinguished from those in this case. The defendant in Enmund was waiting in the getaway car during a planned robbery when one or both of his co-felons shot and killed two victims who resisted the robbery. On appeal, the United States Supreme Court held that the death penalty was disproportionate to Enmund's personal

culpability. The Court reasoned that Enmund did not personally "kill or attempt to kill" or have "any intention of participating in or facilitating a murder." Enmund, 458 U.S. at 798, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152.

Examination of the record in this case, as construed by the Supreme Court of Florida and the district court, leads us to the conclusion that the individual culpability of Griffin is significantly greater than the culpability of the defendant in Enmund. Sufficient evidence exists in the record to support a finding that Griffin not only contemplated that lethal force might be employed during the robbery and, thus, possessed an intent to kill, but rather that he actually committed the murders himself.

At trial, Willie James Bryant testified that he drove Griffin and Robert Hinson from Gainesville, Florida, to Starke, Florida, on the night of the robbery and murders. Hinson and Griffin got out of the car and went into the convenience store. Bryant testified that he then heard a shot and saw Hinson coming out of the convenience store holding a brown paper bag. Bryant also saw Griffin leaving the store, holding a gun in one hand and Keith Kirchaine by the other. Next, Bryant testified that he then drove the car down the road until Griffin commanded him to stop. Upon stopping, Kirchaine pleaded not to be harmed, but Griffin dragged Kirchaine into the woods and shot him.

Moreover, Alex Henry, Griffin's neighbor and friend, testified that on the

next day, Henry heard the news of the robbery and murder on the radio. Henry further testified that on that afternoon, Griffin came to him and said that he and Willie James Bryant had robbed the store in Starke and that he, Griffin, had shot the two victims. Henry testified that Griffin then showed him a long, dark-colored, .22 caliber revolver. Henry added that the gun shown to him, by Griffin, looked like the drawing that depicted the convenience store manager's missing fun.

The evidence is more than sufficient to support a finding that Griffin, unlike the defedant in Enmund, personally killed his victims by willfully shooting them. Griffin argues that he did not act alone. See Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir.1983). While it is true

that others participated in some of the events during the night of the murders, sufficient evidence exists to support a finding that Griffin acted alone in the actual killing of Lundgren and Kirchaine. Griffin, therefore, is fully culpable for the murders. After examining the individual culpability of Griffin, as did the Supreme Court in Enmund, we agree with the district court's conclusion that the death penalty is not disproportionate in relation to Griffin's participation in the murders. Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (plurality opinion).

CONCLUSION

In sum, we hold that: (1) Griffin did not receive ineffective assistance of counsel, and the district court did not err

in refusing to grant Griffin evidentiary hearings on his claims; (2) the district court correctly concluded that many of Griffin's claims were procedurally barred because Griffin failed to raise them on direct appeal as Florida procedure requires; (3) Griffin has not shown "cause and prejudice" in order to advance in federal court many of his claims which were barred by procedural default; (4) Griffin's claim of unconstitutional application of the death penalty is remanded to the district court for consideration in light of our recent en banc decisions in McCleskey and Ross v. Kemp, 756 F.2d 1483 (11th Cir.1985); and (5) Griffin's capital sentence is not unconstitutional under the principles of Enmund v. Florida. Finding no merit in Griffin's contentions, we hold

that the district court properly denied Griffin's petition for habeas corpus relief.

AFFIRMED in part, REMANDED in part.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 84-3196

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KENNETH GRIFFIN,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

- - - - - - - - - - -

Appeal from the United States District
for the Middle District of Florida

- - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 10, 1985, 11 Cir., 198__, ____ F.2d ____).

( August 5, 1985)

Before KRAVITCH and HATCHETT, Circuit Judges, and HANCOCK, District Judge.

PER CURIAM:

The Petition for Rehearing of appellant is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26, the Suggestion for Rehearing En Banc is DENIED.

s/s Joseph W. Hatchett
United States Circuit Judge

EDITOR'S NOTE

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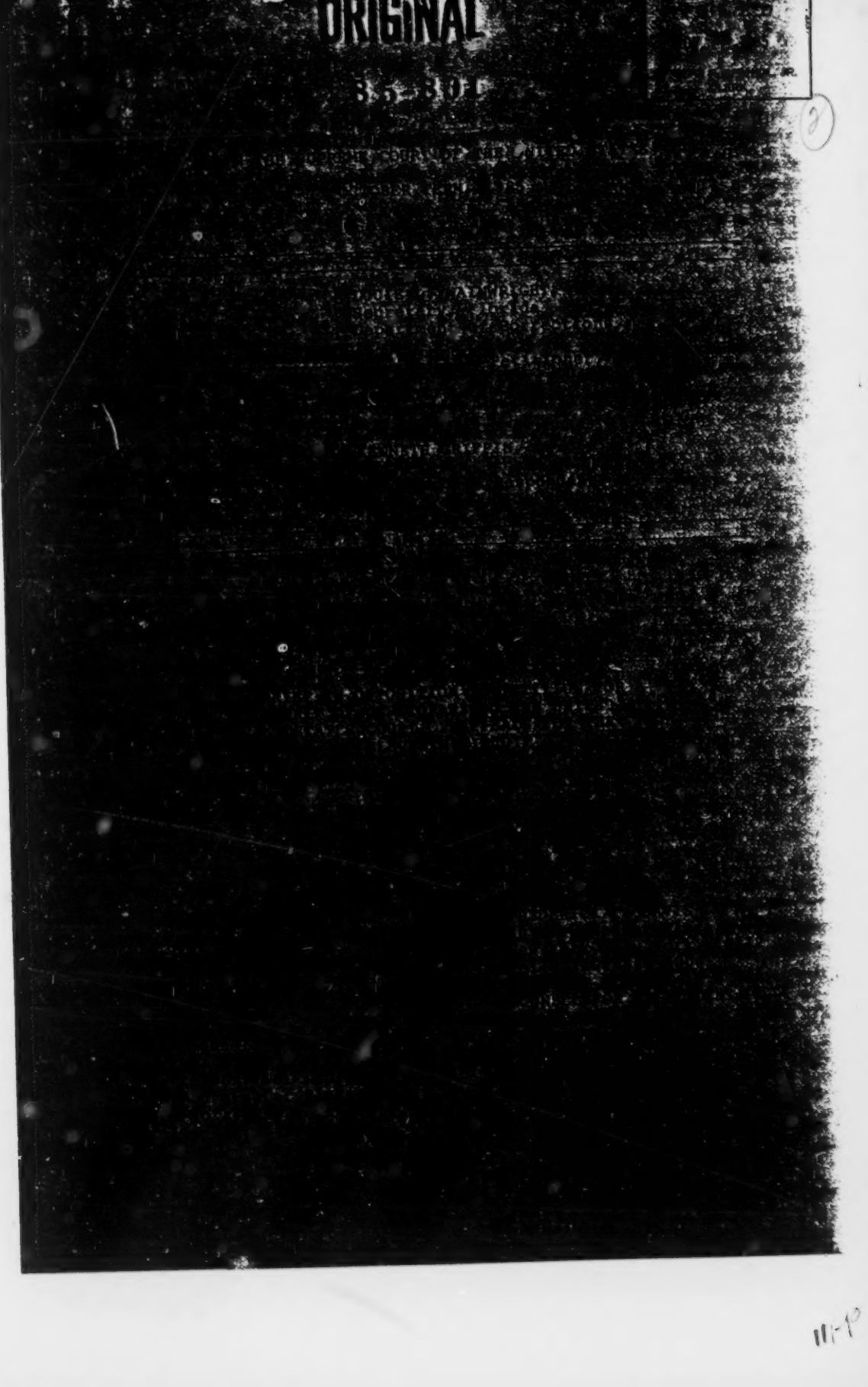
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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LOUIE L. WAINWRIGHT,
Secretary, Florida
Department of Corrections,

Petitioner,

v.

KENNETH GRIFFIN,

Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent Kenneth Griffin respectfully requests that Petitioner's petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered on May 10, 1985 be denied, and that his own petition, previously submitted to the Court, be granted and the writ issued.

PRELIMINARY STATEMENT

The parties to this case agree that whether Florida's system for imposing the death penalty is racially discriminatory is an issue properly before this Court. The State of Florida, however, asserts that such a fundamental constitutional challenge, based on substantial empirical evidence, should never be given plenary consideration by this Court. Respondent Kenneth Griffin, on the other hand, simply seeks an evidentiary

hearing in the District Court so that a record can be developed for serious consideration by the federal judiciary.

On the merits, the issue is relatively straightforward. In 1972, this Court struck down then-existing death penalty statutes, in part because of concern about racial discrimination in their imposition. Furman v. Georgia, 408 U.S. 238, 249-256 (1972) (Douglas, J. concurring); id. at 310 (Stewart, J., concurring); id. at 364 (Marsnall, J., concurring). Simply put, it appeared that blacks were being executed for crimes for which whites would not have been.

By and large, that form of racial discrimination appears no longer to prevail. Instead, a much more invidious form of discrimination has apparently grown up: discrimination based on the race of the victim; that is, a pattern of executions apparently premised on the notion that the lives of black victims are "cheaper" than those of whites, and that taking a black life is therefore deserving of less serious punishment.

Presumably, a state law which permitted the white race of a victim to be considered as an "aggravating" circumstance in the penalty phase of a capital trial -- or a statute which made the black race of a victim a "mitigating" circumstance -- would be instantly struck down by this Court. See Furman v. Georgia, 408 U.S. 238, 256 (1972) (Douglas, J., concurring). Yet, persuasive evidence exists, and exists in this case,* that precisely the same effect as would be intended

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* Included in this evidence is the fact that six times during Mr. Griffin's five-day trial, the prosecutor found occasion to remind the jury of the race of the victims in the case. While the lower courts have held that these references were for purposes of identification, the truth

(footnote continued on next page)

by the framers of such a non-existent statute is being achieved under color of law in Florida.* Kenneth Griffin seeks only to develop this evidence at a federal hearing, and then to present it for adjudication. Petitioner seeks to foreclose the question, as a matter of law, not because it doubts the evidence, but because it hopes to continue to head off any serious, plenary consideration of such distasteful circumstances by this Court.** But refusing to face facts does not change them.

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(footnote continued from previous page)

is that the victims' identification was never in dispute in any way. No witness made any reference to race except as he was requested to do so by the prosecutor.

* Petitioner insists that the law requires a specific finding of intent to discriminate against Kenneth Griffin. Such intent, however, can also be inferred here, just as it would be if the hypothetical statute discussed in the text were passed without any legislative history. Surely the requirement of intent does not mean that discriminatory deeds must be accompanied by overt words stating an intent in order to be actionable.

** The Petition of the State of Florida significantly omits the fact that none of the statements in Wainwright v. Ford, 104 S. Ct. 3498 (1984); Wainwright v. Adams, 104 S. Ct. 2183 (1984) and Sullivan v. Wainwright, 464 U.S. 109 (1983) followed plenary consideration of the issues by this Court. Sullivan was an application for a stay of execution, decided the day after it was made, and Justice Brennan was forced to note that "Sullivan's claim has not received the thoughtful consideration to which it is entitled." 464 U.S. at 113 (Brennan, J., dissenting) In Adams, the Court rendered its decision in one day, refusing Justice Marshall a second day in which to write a full dissent, and causing him to assert that "The haste and confusion surrounding this decision is degrading to our role as judges . . . the Court has utterly failed to attend to this case with the careful deliberation it deserves." 104 S.Ct. at 2184, 2185 (Marshall, J., dissenting). The cited language in Ford, also decided within one day, represented the views of only three justices, and then in the alternative. Moreover, Ford, unlike the present case, presented the possibility that petitioner there had abused the writ of habeas corpus, and, also unlike the instant action, involved unexcused procedural default.

## ARGUMENT

### KENNETH GRIFFIN IS ENTITLED TO A FEDERAL EVIDENTIARY HEARING ON HIS EMPIRICAL SHOWING THAT FLORIDA'S DEATH PENALTY SYSTEM SEEKS TO DISCRIMINATE AGAINST HIM ON THE BASIS OF RACE

In remanding this case to the District Court on the issue of racial discrimination, the Eleventh Circuit directed that the District Court reconsider the issue "in light of our recent en banc holdings in McCleskey [v. Kemp, 753 F.2d 877 (11th Cir. 1985)] and Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985)." 760 F.2d 1505, 1518 (11th Cir. 1985). The Court of Appeals went on, however, specifically to note that it did "not imply that the district court must necessarily hold a full evidentiary hearing on this issue; whether an evidentiary hearing is required will depend on the presence or absence of factual issues." Ibid. Respondent Kenneth Griffin asserts that such an evidentiary hearing is necessary, so that a factual record can be developed on this fundamental constitutional issue.

No such record has yet been developed because of the way this case moved through the state and lower federal courts in March 1984. To briefly recapitulate those events, present counsel entered the case on March 1, 1984, after efforts to secure a Florida lawyer had failed and the President of the Florida State Bar had written that local attorneys were "intimidated" by Mr. Griffin's imminent execution date of March 20. The Death Warrant then in effect was the first issued for Mr. Griffin; no proceedings for post-conviction relief had been held in any court, although Mr. Griffin had filed a perfunctory motion for such a relief on April 20, 1983.

New counsel moved for post-conviction relief on Tuesday, March 6. Extensive supporting papers, including the statistical studies at issue here, were filed on Friday, March 9. Two and one-half hours later the state trial court held all of Mr. Griffin's claims except that of ineffective assistance of counsel barred by procedural default.* Thus, no hearing was held on this issue, and no evidence relating to the racial discrimination claim could be developed in state court.

The hearing on ineffective assistance of counsel was held on Tuesday, March 13, and Mr. Griffin's motion was denied late that same night. On Wednesday morning, March 14, Mr. Griffin appealed to the Supreme Court of Florida. That Court heard argument on March 15 and affirmed the trial court in all respects on Friday, March 16. Mr. Griffin's petition for a writ of habeas corpus was filed in the District Court that same afternoon.

On Monday, March 19, with Mr. Griffin's execution then scheduled for the next day, the District Court heard oral argument, and then issued a 72-hour stay of execution. On the racial discrimination issue, the District Court was presented with only the statistical evidence, but counsel specifically asked for an evidentiary hearing to develop the factual record with regard to Mr. Griffin personally. The request for hearing was denied.

Serious doubt must be raised even about whether the District Court fully considered the proffered statistical stud-

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* The District Court and the Court of Appeals in this case both later held that this procedural ruling was in error and that under Florida law the state trial court should have addressed this issue on the merits. 588 F. Supp. 1549, 1568 (M.D. Fla. 1984); 760 F.2d at 1518.

ies, which are extensive.* The District Court issued its 48-page opinion at 4:25 a.m. on Wednesday, March 21. The District Judge had apparently not read the studies at the time of oral argument, and then had the case sub judice for only 40 hours. When the District Court's opinion was issued, Mr. Griffin's scheduled execution was just over 50 hours away. While the District Court held that the racial discrimination claim was not barred by procedural default, 588 F. Supp. at 1568,** it provided neither the time nor an opportunity for the claim to be developed or considered. Only later that day did the Court of Appeals stay the execution beyond the expiration of the Death Warrant.

It must be clear that such a timetable is not conducive to judicious considerations of life-and-death issues. Moreover, it virtually negates any possibility that a meaningful record can be developed on evidentiary questions as complex as the racial discrimination claim presented here.

The State of Florida's contention that no remand whatsoever is warranted is disposed of squarely by the Court of Appeals' opinion itself. Such a remand is necessitated by two factors: first, that the applicable legal standard has changed, in light of the Eleventh Circuit's acknowledgement that "Spinkellink [v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)] can not be read to foreclose

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* Perhaps the most significant of the studies, that by Gross and Mauro, has recently been published in the Stanford Law Review. Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homocide Victimization, 37 Stan. L. Rev. 17 (1985).

** This holding of no procedural default was subsequently affirmed by the Court of appeals. 760 F. 2d at 1518. See Henry v. State, 377 So. 2d 692 (Fla. 1979).

automatically all Eighth Amendment challenges to capital sentencing conducted under a facially constitutional statute." McCleskey v. Kemp, 753 F.2d 877, 891 (11th Cir. 1985) and second that, as the Court of Appeals acknowledged in a footnote, 760 F.2d at 1518 n.3, the cases setting forth the new standard, McCleskey and Ross, dealt solely with Georgia cases, while this case arose, and the data for these studies was produced, in Florida.

On remand, if granted an evidentiary hearing, Mr. Griffin would present expert testimony on race discrimination in Florida and on the methodology involved in the proffered studies. At such a hearing, the State could and should be directed to produce evidence on these issues within its possession. No hearing like that proposed has ever been held on the statistically apparent race bias in Florida's death penalty system. The time for such an inquiry by our federal courts is long past due.

## CONCLUSION

For the reasons set forth above, the Petitioner State of Florida's petition should be denied. Respondent Kenneth Griffin's petition granted, and the Writ of Certiorari issued to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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